IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

No.

BILLIE P. JONES, formerly BILLIE P. SCHELLENBERGER, Administratrix of the Estate of RALPH D. SCHELLENBERGER, Deceased,

Petitioner,

vs.

JAMES A. SCHELLENBERGER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

Petitioner seeks review of the decision of the Court of Appeals of September 6, 1955, but does not attach a copy of that opinion to her petition in conformity with the provision of this Court's Rule 23. We therefore print the full text of the opinion as Appendix I to this brief. The opinion is reported in 225 F (2) at pages 784 to 795.

The earlier opinions of the Court of Appeals are cited in the body of the petition but are not cited at the commencement thereof as required by this Court's Rule 23.

Those opinions are attached to the petition. The Court's opinions in two earlier appeals in this litigation will be found at 196 F (2) 852 and 201 F (2) 29.

Statement of the Case.

As we have noted under the heading "Opinions Below", the petition for *certiorari* does not have attached to it a copy of the opinion of the Court of Appeals of September 6, 1955, which is the opinion of which petitioner seeks this Court's review. Nor does the petition even advert to, much less does it quote or discuss, the statements in that Court's unanimous opinion of the considerations that constrained it to grant rehearing in this case.

In the opinion of the Court of Appeals of May 26, 1955, which is the opinion superseded by the present opinion, that Court had said (Appendix to Petition, pp. 39-40):

> "Another indication that defendant by his then counsel recognized that the present issue had been either waived or finally adjudicated resides in the fact that the Illinois Appellate Court decision now so heavily relied upon, rendered almost two years prior to the decree appealed from, was not cited or called to the attention of the District Court."

Recognizing error of fact in this statement, the Court said in its opinion of September 6, 1955 (Appendix I to this brief, 225 F (2) 784, at pp. 786-7):

> While we need not offer any excuse for reaching what we now think was an erroneous conclusion, it is perhaps pertinent to note that we labored under the impression that the Lynch decision was not called to the attention of the Master or the District Court. In

fact we stated, 'Another indication that defendant by his then counsel recognized that the present issue had been either waived or finally adjudicated resides in the fact that the Illinois Appellate Court decision now so heavily relied upon, rendered almost two years prior to the decree appealed from, was not cited or called to the attention of the District Court.' This erroneous statement, relied upon to fortify our conclusion that the defendant had waived the survivorship defense, was due to the fact that we examined only the printed record, which did not contain either the Master's report or the opinion of the District Court rendered on defendant's objections to the Master's report and upon which was predicated the decree from which the appeal comes. However, the original transcript of the record contains a copy of the Master's report and the opinion of Judge Campbell, together with the decree. Both the Master's report and the court's opinion disclose that the survivorship issue was heavily relied upon by the defendant and that it was thoroughly considered, discussed and decided adversely to the defendant. Moreover, plaintiff did not raise before the Master or the District Court the issue of waiver by defendant. As a matter of fact, no such issue was raised by the plaintiff in this court, although it was incidentally referred to in her brief."

Save for petitioner's surprising omission of any allusion to the grounds upon which the Court of Appeals granted rehearing, petitioner's Statement of the Case is in no material respect false or inadequate. However, we deem it unclear and unnecessarily discursive.

All of the facts necessary to a consideration of the questions raised by petitioner may be thus tersely stated:

Plaintiff, widow and Texas Administratrix of Ralph Schellenberger, brought this Brief against the defendant, a resident of Illinois and surviving brother of Ralph, this suit for an accounting with respect to the affairs of an automobile partnership that had subsisted until Ralph's death.

In the defendant's answer to the plaintiff's complaint, he set forth the full text of the articles of partnership. (Tr. 9.)

Those articles contained, *inter alia*, the covenants that the brothers owned the business

> "as joint tenants with the right of survivorship, and upon the death of either party hereto, all right, title and interest herein shall vest immediately unto the surviving partner." (R 10.)

and that

> "In case of the death of either partner, the whole of the assets or effects of the said partnership shall accrue immediately to the surviving partner." (R 12.)

At the time that the plaintiff's complaint and the defendant's answer were filed, there was a conflict in the decisions of other states and no decision of the Illinois Supreme or Appellate Courts upon the question of State substantive partnership law:

> ARE PROVISIONS IN ARTICLES OF INCORPORATION THAT UPON THE DEATH OF A PARTNER, THE SURVIVING PARTNER OR PARTNERS SHALL TAKE THE ASSETS FREE OF ANY OBLIGATION TO ACCOUNT TO THE PERSONAL REPRESENTATIVE OF THE DECEASED PARTNER VALID OR INVALID AS A MATTER OF STATE LAW?

The District Court, without the guidance of Illinois authority upon this question, adopted the view that such provisions were invalid and struck the defendant's assertion of these covenants as a defense to the plaintiff's suit. His language embodying this ruling is correctly reproduced at pages 10 and 11 of the petition and will not be repeated.

On September 20, 1951, the district court entered a judgment (termed through this litigation a "decree") again rejecting defendant's assertion of the exonerative provisions of the contract as a defense (Tr. 64) and directing respondent to account to petitioner. (Tr. 65-6). *Now this decree did not grant petitioner any final relief.*

Petitioner vigorously contended below but appears to have abandoned the contention here that this decree, which merely directed an accounting, was *res judicata*. The presently standing opinion of the Court of Appeals rejects that contention in the light of this Court's decision in *Latta* v. *Kilbourn*, 150 U. S. 524, which holds that decrees that do no more than direct an account with respect to a partnership are not final, not appealable and not *res judicata*.

On November 25, 1952, fourteen months and five days after the trial court's original decree directing an accounting, the Appellate Court of Illinois for the First District decided the case of *Lynch* v. *Ilg*, abstract opinion published only, 348 Ill. App. 545, opinion reprinted in full, Appendix C to the instant petition. In this case the Appellate Court held that provisions whereby a surviving partner is to take all of the partnership assets free of any duty to account to the representative of the deceased partner is not contrary to the public policy of Illinois. The Illinois Supreme Court denied to leave to appeal 413 Ill. 627. In the present opinion of the Court of Appeals in this case, that Court recognizes that denial of leave to appeal by the Supreme Court of Illinois, unlike denial of *certiorari* by this Court, imports approval of the Appellate Court's decision. The present opinion of the Court of Appeals in this case quotes the following language from *Walters* v. *Walters*, 409 Ill. 298:

> "The denial of leave to appeal, then, attests that this court [the Illinois Supreme Court] thought the result was correct and proper under the facts there presented."

The only question presented in the *Lynch* case was that of the validity of "survivorship without accounting" provisions in articles of partnership. Hence the Court of Appeals held that the Illinois Supreme Court's denial of leave to appeal in the *Lynch* case represented that Court's adjudication that such contracts do not contravene Illinois' public policy.

After the rendition of the decree directing respondent to account to petitioner and after the decision in the *Lynch* case, respondent did indeed prosecute two intermediate appeals to the Court of Appeals, each of which resulted in a decision of that Court adverse to that of respondent. The first of these appeals was from an order of the district court denying the motion of an Illinois administrator, whose appointment respondent had procured, to substitute himself for petitioner, a Texas administratrix, as plaintiff. This order was affirmed. *Jones* v. *Schellenberger*, 196 F (2) 852. The second appeal was from an order appointing a receiver at petitioner's instance. This order was also affirmed. *Jones* v. *Schellenberger*, 201 F (2) 29.

The first of these appeals only required the Court of Appeals to decide who was the proper plaintiff, the Texas administratrix or the Illinois administrator, and the second of them required the court only to decide whether a *custodial* (not a liquidating) receiver should be installed during the pendency of the accounting proceedings.

In its present opinion the Court of Appeals has recognized in substance that while it had discretion to entertain a contention, had the contention been made, that the articles of partnership constituted a defense to respondent's suit under the teachings of *Lynch* v. *Ilg*, it was not obliged to do so.

Therefore, reasoning in substance that since respondent had no right to an adjudication upon that substantive issue, even though he might have procured such a decision in the exercise of the court's discretion, it refused to apply the doctrine of *res judicata* to respondent's two intermediate appeals.

Moreover, the Court of Appeals said in its present opinion (Appendix I, *post*, 225 F (2) 784 at 790):

> "In *Southern Railway Company* v. *Clift*, 260 U. S. 316, 319, 43 S. Ct. 126, 67 L. Ed. 283, the court, with reference to a prior ruling in the same case, stated:

" 'The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and *res judicata*. One directs discretion; the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission.'

"In *Messinger* v. *Anderson*, 225 U. S. 434, 444, 32 S. Ct. 739, 740, 56 L. Ed. 1152, the court stated:

" 'In the absence of statute the phrase, "law of the case," as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. (Citing cases.)'

"Furthermore, it is the duty of federal courts at any state in the course of a proceeding to give effect to state law. In *Huddleston* v. *Dwyer*, 322 U. S. 232, 236, 64 S. Ct. 1015, 1018, 88 L. Ed. 1246, the court quoted from its previous decision in *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538, 543, 61 S. Ct. 347, 85 L. Ed. 327, as follows:

" 'Until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.'

"Under this pronouncement it appears plain that a District court as well as this court is obligated to give effect to any change in state law made during the course of a proceeding, and we perceive no reason to doubt but that the obligation persists even though it requires further consideration of a question previously decided by a decree which under some circumstances may be regarded as final."

The Court of Appeals did hold, in response to a virtual concession by respondent's present counsel, that respondent, although not obliged to account to petitioner, had been guilty of reprehensible conduct in attempting to procure an amicable Illinois administrator and in conduct entail-

ing the necessity for and expense of a receiver. It taxed all of the costs against respondent and virtually directed the district court to do likewise. Respondent does not challenge the propriety of this part of the Court of Appeals' opinion. Indeed, as the opinion discloses, respondent's counsel practically invited the taxing on rehearing of the costs against respondent even though he should be the prevailing party.

The Court of Appeals said (Appendix I, *post*, 225 F. (2) 784, at pp. 794-5):

> "Defendant's counsel, who has represented him only on this appeal, appears to sense the situation. His petition for rehearing contains the following headnote, 'Any actual imposition upon Mrs. Schellenberger because of the reversal by this Court can be corrected by this Court's or the District Court's apportionment of costs." The petition continues: '* * * If this Court feels that she has been substantially prejudiced by the expense incidental to the defendant's appeals from the interlocutory orders or has otherwise suffered because this litigation has been unnecessarily protracted, it is within this Court's power to rectify that injustice by apportionment of the costs, expenses and attorneys' fees, including the taxing of all of the expenses of the receivership and such other items as may appear to the Court to be just, against the defendant.' We appreciate this candid concession on the part of defendant's counsel. In our view, defendant should be required to pay all costs and expenses incurred in this proceeding, and all costs in this court are taxed to him. We think the taxation of costs other than those incurred in this court is a matter for the District Court."

The Questions Presented.

Petitioner's Statement of the Questions Presented is correct.

ARGUMENT.

I.

The respondent did not waive the defense of "the survivorship without accounting" provisions of the articles of copartnership. Nor was any adjudication of the District Court or of the Court of Appeals on respondent's two prior appeals res judicata.

The passage from the opinion of the Court of Appeals, quoted in the Statement of the Case, *ante,* which is not even mentioned, much less criticized, by petitioner is fully responsive to petitioner's contention that respondent waived the defense of the articles of partnership in the District Court. He pleaded them in the first pleading that he filed, his answer to the plaintiff's complaint (Tr. 7). The trial court struck that defense. An order that in effect sustains a demurrer to one of several defenses is of course not final and is not appealable. As the opinion of the Court of Appeals points out, he pressed the decision of the *Lynch* case upon the District Court vigorously.

So much for the contention that respondent abandoned his defense in the District Court.

The contention that the decision of the Court of Appeals on respondent's two intermediate appeals were *res judicata* or, alternatively, that respondent waived the defense of the articles of copartnership by not pressing that defense on these two intermediate appeals, are likewise answered by the present opinion of the Court of Appeals.

A

Petitioner abandons here the contention that the District Court's decree directing the taking of an accounting was res judicata.

As appears from the present opinion of the Court of Appeals, petitioner vigorously contended in that court that the decree of the District Court directing the taking of an accounting was *res judicata*. The present opinion of the Court of Appeals declares this case to be indistinguishable from *Latta* v. *Kilbourn*, 150 U. S. 524. That case, precisely like the instant case, was a suit for a partnership accounting. In that case, precisely as in the instant case, the question was whether the defendants were required to account for certain assets and profits, the question turning, as the substantive question in this case turns, upon a construction of written articles of partnership. In that case, as in this case, no appeal was taken from the decree directing an accounting. In that case, as in this case, it was contended by the plaintiff that the decree directing the accounting was *res judicata*.

This Court rejected the contention.

Since petitioner neither distinguishes nor asks this Court to overrule the *Latta* case, we assume that petitioner abandons her contention that the decree directing the taking of an accounting was final, appealable and *res judicata*.

If that contention is before this Court, we rely upon this Court's decision in the *Latta* case and the language of the present opinion of the Court of Appeals as our response to that contention.

B

Neither of the two prior appeals to the Court of Appeals entitled either of the parties to a ruling upon the question of the validity of the exonerative provisions of the articles of partnership. Therefore neither decision could be res judicata.

Petitioner argues that respondent could have raised his substantive contention that the exonerative articles of partnership presented a complete defense to the petitioner's suit, that the Court of Appeals could have decided that question and that therefore the former appeals are *res judicata.*

But petitioner overlooks the important consideration that while a federal reviewing court may in its discretion dismiss a suit on the merits where it affirmatively appears that the plaintiff has no case, *it is not obliged to do so and neither party has a right to have it do so!* Disposition of the merits upon interlocutory appeals is discretionary, not obligatory, upon a reviewing court.

We are aware of no case (certainly petitioner cites none) that requires a litigant to canvass the merits upon an interlocutory appeal when he is not entitled to a decision upon the merits but at most can hope for a favorable exercise of the reviewing court's discretion to dispose of the case upon an interlocutory appeal.

However, even if respondent could have insisted upon a decision upon the merits on either or both of his previous appeals, the doctrine of *res judicata,* properly so called, does not apply to successive decisions in the same case, as distinguished from earlier adjudications in actions collaterally attacking them.

The language of the Court of Appeals already quoted in the Statement of the Case, is repeated for the Court's convenience, immediately below, is dispositive of this point. (Appendix I, *post*, 225 F. (2) 784 at 790.)

> "In *Southern Railway Company* v. *Clift*, 260 U. S. 316, 319, 43 S. Ct. 126, 67 L. Ed. 283, the court, with reference to a prior ruling in the same case, stated:
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> " 'The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and *res judicata*. One directs discretion; the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission.'
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> " 'In the absence of statute the phrase, "law of the case", as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. (Citing cases.)'
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> "Furthermore, it is the duty of federal courts at any state in the course of a proceeding to give effect to state law. In *Huddleston* v. *Dwyer*, 322 U. S. 232, 236, 64 S. Ct. 1015, 1018, 88 L. Ed. 1246, the court quoted from its previous decision in *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538, 543, 61 S. Ct. 347, 85 L. Ed. 327, as follows:
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> "'Until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.'
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> "Under this pronouncement it appears plain that a District Court as well as this court is obligated to give effect to any change in state law made during the course of a proceeding, and we perceive no reason to doubt but that the obligation persists even though it requires further consideration of a question previ-

ously decided by a decree which under some circumstances may be regarded as final."

In contending that the order appointing a receiver was final and appealable, petitioner cites *Hermanos* v. *Puerto Rico*, 118 Fed. (2) 757 (CCA 2). The *Hermanos* case in indeed pertinent. But it strongly supports respondent, not petitioner. In the *Hermanos* case, the decree appointed, *not* an interlocutory receiver as custodian of property pending the entry of an ultimate decree, but a *statutory receiver as successor to the corporation*, finally adjudicated that the officers and directors of the corporation had no authority to administer its affairs, *permanently divested title*, and authorized the receiver to create substantive "liens which will take precedence over the property interests of the shareholders." Of this decree, the Court said,

> "Such an order, in our opinion is a 'final decision' within the meaning of 28 U.S.C.A. sec. 225."

But the Court made the following observation, most pertinent in the instant case, at page 757:

> "The ordinary order, appointing a receiver is truly interlocutory, *leaving questions of substantive right for future determination.*" (Emphasis supplied.)

Petitioner does not cite a single case in which any court, State or Federal, has held that a decision on an interlocutory appeal is *res judicata* merely because the reviewing court might have decided the merits upon such an appeal.

II.

Petitioner's contention that the Court of Appeals misapplied Lynch v. Ilg should not evoke certiorari.

A

While this Court may, it almost never will, grant certiorari merely to reappraise the decision of a Court of Appeals upon a question of State law.

We recognize that whereas this Court does not possess jurisdiction to review a State court's decision on a point of that State's law, it does in the technical sense have jurisdiction to review the application by a Court of Appeals of State law under *Erie Railroad* v. *Tompkins*, 304 U. S. 64.

However, exercise of this discretion is almost never indulged in cases such as this one, that is, in cases where a Court of Appeals has construed a State statute in the light of an authoritative or even a merely persuasive decision of a State court.

Nor will this Court usually grant *certiorari* merely to review lower Federal courts' construction of a private contract in the light of applicable State decisions.

In this case the Court of Appeals has done no more than hold that *Lynch* v. *Ilg* ranges Illinois among those States that sanction exonerative provisions in articles of partnership.

We must suggest, too, that in this case the petitioner herself sought a Federal, not a State, tribunal for adjudication of rights arising wholly under Illinois law. The respondent, a citizen of Illinois, could not have removed this case to the district court had petitioner instituted it in a State court. Petitioner could have had an adjudication upon this question of her law by Illinois courts had she desired such an adjudication.

B

The Court of Appeals correctly applied Lynch v. Ilg to the instant case. The result is consonant with the clearly expressed intention of the parties and with justice.

The logic of *Lynch* v. *Ilg* is simple. It has commended itself to many but not to all other courts.

Litigation between a surviving partner and the personal representative of a deceased partner can be costly and bitter. It may well devour all of the assets of a small business, particularly a business in which it is skill and not assets that produce the earnings. There is nothing unreasonable about a State's permitting each partner to say in effect to the other, "I will renounce any claim for my estate if I predecease you if you will renounce any claim for your estate if you predecease me."

Petitioner says at page 20 of the petition:

> "The court in its final opinion overlooked entirely the express provision of Section 340, Chap. 3 of the Illinois Revised Statutes, which in substance provides an easy, simple and effective way if disposing of partnership estates. Said statute even dispenses with the requirement of opening an estate. All the defendant had to do within sixty (60) days after the death of his brother was to file a verified inventory of the partnership assets and pay the heirs their just share of the partnership assets."

The fallacy of this observation is apparent:

No matter how fairly, justly, even generously a surviving partner may inventory the deceased partner's share of the estate, there is nothing to prevent a dissatisfied personal representative from prosecuting litigation for many years and through many courts in attempting to overturn that accounting.

In this very case, had the intention of the parties been given prompt fulfillment, this costly litigation would have been avoided.

Nor is there merit to the contention of petitioner expressed in the following language at page 22 of her petition:

> "If this decision is permitted to stand instrumentalities purporting to create joint tenancies with the incident of survivorship in partnership property will be fraudulently used as a convenient means of defeating widows of their dower rights and to defeat the rights of widows and minor children of deceased partners of their rights of inheritance. The holding is not only inequitable and contrary to the law of partnerships but is of nationwide application and importance."

The mere fact that a type of contract may be abused is no ground for invalidating it. Actually, neither wives nor children have any "right of inheritance" save such as the State law gives to them. In most states a man can disinherit his children entirely and give away all personal property as well as most of his real estate, to the exclusion of the rights of the widow.

Finally, this question is not, as petitioner says, "of nationwide application and importance." The only substantive questions presented to the Court in the case are ones of State law and are of the construction of a particular contract between two brothers. This Court's decision could not settle the law even for Illinois, to say nothing of the other forty-seven states.

Conclusion.

For reasons apparent in the present opinion of the Court of Appeals and urged in this brief, it is respectfully submitted that *certiorari* should be denied.

WILLIAM C. WINES,

Attorney for Respondent.

APPENDIX A.

Jones v. Schellenberger, 225 F. 2d 784.

The plaintiff, formerly Billie P. Schellenberger, widow of Ralph D. Schellenberger, Texas administratrix of his estate and a citizen of Texas, brought this suit in the Northern District of Illinois against the defendant, James A. Schellenberger, a citizen of Illinois, brother of Ralph surviving partner of an automobile retailing partnership which was dissolved by Ralph's death, for an accounting with respect to the affairs of the firm.

Ralph D. Schellenberger died July 1, 1945, and the complaint was filed October 14, 1948. Defendant's answer to said complaint was filed November 10, 1948, to which was attached a copy of the articles of co-partnership entered into between the decedent and the defendant, dated December 10, 1937.

After prolonged litigation, including two previous appeals to this court, 196 F. 2d 852, and 201 F. 2d 29, with numerous references to a Master, a decree was entered September 27, 1954, approving in the main the report and supplemental report of the Master, dated respectively June 10, 1953 and August 21, 1953, in which it was adjudged and decreed that the plaintiff have and recover from the defendant the sum of $268,049.13, together with certain specified interest and costs. From this decree defendant appeals.

The partnership agreement set forth in detail the rights, duties and obligations of the partners, including the following provisions:

> "It is further agreed that the party of the first part and the party of the second part shall both and each of them participate and own the said business and partnership jointly as joint tenants with the right of survivorship, and upon the death of either party hereto, all right, title and interest therein shall vest immediately unto the surviving partner.
>
> * * * * * *
>
> "In case of the death of either partner, the whose of the assets or effects of the said partnership shall accrue immediately to the surviving partner."

(The instant controversy turns upon the effect to be given to this language, which will subsequently be referred to as the "survivorship provision.")

The sole reason urged for reversal is that by the "survivorship provision" all of the partnership property at the time of the decedent's death passed to the defendant and he became the sole owner thereof. This, so it is asserted, constitutes a bar to plaintiff's cause of action and requires a reversal with directions to dismiss the complaint. Defendant, in support of this contention, relies almost exclusively upon a decision of an Illinois Appellate Court, *Lynch* v. *Ilg*, 348 Ill. App. 545, 109 N. E. 2d 362 (hereinafter referred to as the *Lynch* case), in which the Illinois Supreme Court, on January 15, 1953, denied leave to appeal, 413 Ill. 633. It appears that the *Lynch* case is the first and only decision by an Illinois court construing and sustaining a partnership "survivorship provision." Defendant has attached to his brief a copy of the *Lynch* decision, it being reported only in abstract form.

This court, in an opinion rendered May 26, 1955, affirmed the judgment appealed from on the basis that defendant by his acts and conduct had waived the right to invoke the defense based upon the "survivorship provision." Such being our conclusion, we thought it unnecessary to consider or determine whether the rule announced in the *Lynch* case was applicable. We have, on this petition for rehearing, reached the conclusion that our previous decision was erroneous. That decision, therefore, and all orders entered pursuant thereto are vacated and set aside.

While we need not offer any excuse for reaching what we now think was an erroneous conclusion, it is perhaps pertinent to note that we labored under the impression that the *Lynch* decision was not called to the attention of the Master or the District Court. In fact we stated, "Another indication that defendant by his then counsel recognized that the present issue had been either waived or finally adjudicated resides in the fact that the Illinois Appellate Court decision now so heavily relied upon, rendered almost two years prior to the decree appealed from, was not cited or called to the attention of the District Court." This erroneous statement, relied upon to fortify our conclusion that the defendant had waived the survivor-

ship defense, was due to the fact that we examined only the printed record, which did not contain either the Master's report or the opinion of the District Court rendered on defendant's objections to the Master's report and upon which was predicated the decree from which the appeal comes. However, the original transcript of the record contains a copy of the Master's report and the opinion of Judge Campbell, together with the decree. Both the Master's report and the court's opinion disclose that the survivorship issue was heavily relied upon by the defendant and that it was thoroughly considered, discussed and decided adversely to the defendant. Moreover, plaintiff did not raise before the Master or the District Court the issue of waiver by defendant. As a matter of fact no such issue was raised by the plaintiff in this court, although it was incidentally referred to in her brief.

In *Southern Railway Company* v. *Clift*, 260 U. S. 316, 319, 43 S. Ct. 126, 67 L. Ed. 283, the court, with reference to a prior ruling in the same case, stated:

> "The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and *res judicata*. One directs discretion; the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission."

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> "In the absence of statute the phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. [Citing cases.]"

[2] Furthermore, it is the duty of federal courts at any stage in the course of a proceeding to give effect to state law. In *Huddleston* v. *Dwyer*, 322 U. S. 232, 236, 64 S. Ct. 1015, 1018, 88 L. Ed. 1246, the court quoted from its previous decision in *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538, 543, 61 S. Ct. 347, 85 L. Ed. 327, as follows:

> "'Until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law

> under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.'"

Under this pronouncement it appears plain that a District Court as well as this court is obligated to give effect to any change in state law made during the course of a proceeding, and we perceive no reason to doubt but that the obligation persists even though it requires further consideration of a question previously decided by a decree which under some circumstances may be regarded as final.

Defendant's counsel, who has represented him only on this appeal, appears to sense the situation. His petition for rehearing contains the following headnote, "Any actual imposition upon Mrs. Schellenberger because of reversal by this Court can be corrected by this Court's or the District Court's apportionment of costs." The petition continues: "* * * if this Court feels that she has been substantially prejudiced by the expense incidental to the defendant's appeals from the interlocutory orders or has otherwise suffered because this litigation has been unnecessarily protracted, it is within this Court's power to rectify that injustice by apportionment of the costs, expenses and attorneys' fees, including the taxing of all of the expenses of the receivership and such other items as may appear to the Court to be just, against the defendant." We appreciate this candid concession on the part of defendant's counsel. In our view, defendant should be required to pay all costs and expenses incurred in this proceeding, and all costs in this court are taxed to him. We think the taxation of costs other than those incurred in this court is a matter for the District Court.

The decree appealed from is reversed and the cause remanded, with directions that the complaint be dismissed upon payment by the defendant of the costs taxed in this court and those which have or may be taxed against him in the District Court.